

Escaping Orbán's Constitutional Prison

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For the first time in a decade, a united Hungarian opposition to Viktor Orbán and his Fidesz party has a real chance of winning the next national election, slated for April 2022. But even if the opposition can succeed on [a tilted playing field](#), new obstacles will emerge when it tries to govern. Orbán has created a system that locks in Fidesz's power as long as his party hangs onto a mere one-third of the parliamentary seats, and not even the most optimistic members of the opposition imagine Orbán falling that far.

A Legal Lockdown

As things stand now, then, the opposition is trapped in Orbán's constitutional prison if they play by Orbán's rules. An [absolute two-thirds majority is required to change the constitution and a relative two-thirds majority is required to change the huge number of "cardinal laws"](#) that set in legal stone everything from the exact [boundaries of election districts](#) that will stymie election law reform to the definition of public funds that puts beyond public accountability the massive state assets recently transferred into private foundations run by Orbán's loyalists. Anything Orbán cares about has been deliberately majority-proofed so that it can only be legally changed by an opposition supermajority that is out of reach under Orbán's election laws.

Moreover, Orbán has entrenched his own party loyalists in crucial chokepoints in the constitutional order. The republic president's term [happens to end just before the next election](#), allowing the Fidesz supermajority to replace him with one of their own. A Fidesz president can refer any law passed by the new Parliament to the packed Constitutional Court to stall or block its enactment and he can refuse any new judicial appointment. A new Fidesz-faithful Supreme Court president [was parachuted into office on 1 January 2021 for a nine-year term](#) after the two-thirds law written just for him passed the Parliament with only Fidesz votes. The new law allowed the new Supreme Court president to bypass the normal requirements for the job while giving him many [new judgeships to fill and the power to select the particular judges](#) to hear each case once he was installed in office. The [loyal public prosecutor](#) had consistently failed to prosecute even [very visible corruption by Fidesz officials](#) before he was reelected in 2020 for a nine-year term. And, according to recent changes in the law, his replacement can only be elected by a two-thirds majority. [Not enough constitutional judges](#) will rotate off the Constitutional Court during the term of the next government to undo the Fidesz lock on the institution.

Any victorious opposition, then, is faced with a legal situation in which significant change has been deliberately denied to them, requiring them to govern from inside Orbán's legal prison. If the opposition wins a mere majority in the Parliament, its

political will can be blocked by Orbán's legacy laws and hand-picked guardians. [As this symposium demonstrates](#), a debate has arisen over whether the opposition would be justified in breaking out of this system by breaking Orbán's laws.

A Way Out

What can be done? An answer lies in plain sight: Embrace European law as Hungary has already pledged to do.

Hungary is a member of the European Union and the Council of Europe. It joined the Council of Europe in 1990, ratified the European Convention on Human Rights in 1992 and incorporated the Convention into Hungarian Law in Act XXXI of 1993. Hungary acceded to the European Union in 2004, after a 2003 referendum saw 85% of Hungarians vote to join. Both the Council of Europe and the European Union impose legal obligations on Hungary. While Hungary's legal obligations under the ECHR and EU Treaties should have acted as a bulwark against backsliding, neither the COE nor the EU intervened forcefully enough to ensure that Hungary upheld those obligations. Even if European institutions had been more inclined to act, however, the Orbán government made clear it would thwart all efforts to constrain it. Despite having fallen out of the family of constitutional democracies, Hungary still has European legal obligations. Even if European law did not prevent Hungary's slide into autocracy, it can be used to bring Hungary back into compliance with European values now.

For Hungarian law formalists who are concerned about violating existing Hungarian law to restore the rule of law, embracing European law provides a way out of Orbán's legal lockdown. Under Article 7(2) of the 1989 Hungarian Constitution, which was in effect when both the ECHR and EU Treaties were brought into Hungarian law, domesticating major treaties generally required a two-thirds vote of Parliament. Even if the EU Treaties and the ECHR were treated merely as domestic law without the additional force that international law brings, then, they would pose a conflict-of-laws problem within Hungarian law. Domestically speaking, they are two-thirds laws that are now contradicted by Orbán's two-thirds laws.

How can this conflict-of-laws problem be resolved? [The Fundamental Law](#) is clear. Treaties take priority over statutes regardless of whether the statutes are ordinary majority laws or supermajority cardinal laws. The current Fundamental Law specifies in Article Q(2) that "Hungary shall ensure that Hungarian law is in conformity with international law in order to comply with its obligations under international law." The Constitutional Court is given the competence in Article 24(f) of the Fundamental Law of "examining the conformity of national legislation with international treaties." Hungary acknowledges its obligations to follow EU law in particular in Fundamental Law, Article E2 (about which more later). The Hungarian Constitutional Court has, throughout its history, [consistently put international law above national statutes](#). In a conflict between a treaty and a statute, then, the treaty prevails under Hungarian law even without the additional push that the primacy of EU law adds to this conclusion. Moreover, the interpretation of treaties, according to Act L of 2005 on International Agreements, Article 13(1) requires that "The interpretation of the international treaty

[in Hungarian domestic law] shall also take into account the decisions of the body having jurisdiction to resolve disputes relating to that international treaty.” Decisions of the European Court of Justice and the European Court of Human Rights must therefore be considered as interpretive guides in Hungarian law for what those treaty provisions mean.

As a result, if a Hungarian statute – including a two-thirds “cardinal law” – conflicts with a treaty, then the treaty prevails. Of course, for EU Treaties, EU law requires this result. But so does Hungarian law all by itself, so that the principle extends to the ECHR.

Two-Thirds Treaties over Two-Thirds Laws

A new Parliament could turn a new legal page in Hungary by confirming that, on its watch, all legal obligations arising under the EU Treaties and the ECHR (or international law more generally when it has been domesticated in Hungarian law) will take priority over contrary statutes, as indeed the Fundamental Law requires. In short, a new Parliament could simply highlight what is already true in Hungarian law, which is that international agreements take precedence over statutes, including cardinal laws.

Under this theory, a new Hungarian Parliament could begin by bringing into compliance with European law all conflicting national laws. When national statutes conflict with EU law, the process could begin by [“disapplying”](#) those laws that can only be changed by a two-thirds majority. Disapplication means, at a minimum, that no court or state authority may apply those laws any longer, an obligation deriving directly from EU law. But the principle of disapplying national law in the face of conflicting international law extends more broadly throughout Hungarian law, since Act L of 2005 on International Agreements in Article 13(1) requires all national courts to directly apply the ECHR and judgments of the Strasbourg court, among others.

While decisions of the European Court of Justice affect the *applicability* of the national laws, however, the EU cannot reach the *validity* of conflicting laws. The laws would therefore remain formally in effect. All those conflicting laws that could be changed by a simple majority should then be changed because EU law obliges the Member State to take action to nullify them. But if the Hungarian Parliament were to say that it cannot change a two-thirds law with its mere majority, the ECJ would no doubt respond (as it has already said in [Simmenthal](#), [Factortame](#), and [Lucchini](#)) that the national rules blocking compliance with EU law must also be changed. In such a situation, the Hungarian Parliament could justify changing two-thirds laws by a simple majority because it must do so to comply with EU law. With regard to laws that conflict with other sources of international obligations, like the ECHR, the new Parliament could cite Fundamental Law Article Q(2) as the basis for nullifying even cardinal statutes by simple majority, when they are inconsistent with international law.

Having determined to bring Hungarian law into line with European law, what could a new Hungarian Parliament do concretely, then? It might start by complying with

the infringements brought by the European Commission and confirmed by the Court of Justice specifically with regard to Hungary and then take note of pending infringements and warnings from EU institutions that Hungary remains in violation of EU law so that Hungary can get out ahead of these problems. [The Sargentini Report](#) of the European Parliament triggering Article 7 TEU provides just one such list. Finally, the new Hungarian Parliament could work through the implications of Court of Justice judgments in cases involving other Member States that should raise red flags about parallel laws in Hungary. It should do the same with ECtHR judgments, first bringing Hungary into compliance with adverse ruling in the Hungarian cases, then assessing what the rest of the ECtHR case law implies for Hungarian laws on the books.

The most crucial areas to begin with are recovering judicial independence, dismantling the surveillance state, restoring the freedom of civil society and rooting out corruption, all of which have plenty of European law to use.

Restoring Judicial Independence

As we have learned in [a set of ECJ cases involving Portugal, Poland and Romania](#), maintaining an independent judiciary is a requirement for Member States under EU law. A new Hungarian Parliament should set about amending Hungary's laws on the judiciary to bring it into compliance with EU law. Using EU law to disapply the conflicting laws would dispose of the two-thirds supermajority problem, after which changes to the laws on the judiciary could be passed by the new Parliament with a simple majority.

EU law might even be interpreted to permit particular personnel changes that would otherwise pose challenges for the rule of law. In case [C-286/12](#), the ECJ found that retirement age for judges and notaries was unlawfully lowered in 2012. The new positions that were unlawfully opened up in consequence were therefore filled illegally because the positions were not in fact open. At the time, the [European Commission demanded](#) that the prematurely fired judges be reinstated in their prior positions, but, because the Orbán government [delayed responding until all of the posts were filled before even pretending to comply](#), the Commission eventually settled for a mere change in the law to raise the retirement age for the Orbán-appointed new judges. The case is therefore closed. But could a new Parliament revisit those judicial appointments and replace the illegally appointed judges with new ones? It would be enforcing that earlier ECJ decision, not breaking Hungarian law to do so. Alternatively, a new Hungarian Parliament could rely on the April 2021 ECJ judgment in the [Repubblika case](#), which announced the principle of non-retrogression from EU values, to revisit the changes that the Orbán government made to the judiciary with the goal of restoring judicial independence.

The new Parliament should comply with the most recent ECJ judgment on Hungary ([Case 564/19](#), decided on 21 November 2021), confirming that national judges may not declare reference questions irrelevant or closed before a decision of the ECJ and that the judges who made such references may not be punished for sending them. Again, the courts should immediately disapply the two-thirds laws that permitted

these disciplinary measures to occur, which would clear the ground for Parliament to enact simple-majority laws in their place.

If one adds in the ECtHR jurisprudence, we might consider the case involving the unlawful dismissal of Supreme Court President András Baka in 2011, a case which is [still unresolved](#). Judge Baka fell victim to a sudden change in job qualifications that singled him out for removal for political reasons (as the ECtHR found). To make matters worse, the same thing has just happened again, only in reverse. The new president of the Supreme Court who took office at the start of 2021 was installed in that position because the government again changed the qualifications for office to single him out. Otherwise, he would have been unqualified for the job. Hungary could comply with the ECtHR judgment in the *Baka* case by regularizing the qualifications and procedures for filling the presidency of the Supreme Court, starting with a recognition of the fact that a sudden mirror-image change in the qualifications to put an otherwise unqualified judge into that office is no more lawful than the original sudden change of qualifications to remove a qualified judge from that office. Removing the current president of the Supreme Court on the grounds that his appointment violated ECHR law would also address the [concerns of the Council of Europe's Venice Commission](#) over the procedure through which he was selected.

This is just a beginning, but it shows how both EU and ECHR law could be used to reform the judiciary, which was severely compromised under Orbán's reign. Puppet judges could be removed and political independence could be restored – all through legislation prioritizing treaty obligations over other two-thirds laws.

Dismantling the Surveillance State

One could use European and ECtHR law to dismantle the surveillance state that Fidesz has created to monitor the opposition and gather compromising information on anyone that the government might want to tarnish.

A new Parliament might start by revisiting the unlawful termination of the data protection ombudsman in 2011 and his replacement by a Fidesz loyalist, who was just [reappointed in 2020](#) for another nine-year term. The Court of Justice found in [C-288/12](#) that the premature termination of the prior data protection ombudsman's term violated the independence required of that office and the [Commission demanded some \(unspecified\) remedy from Hungary](#). The Commission at the time missed the opportunity to [investigate why the data protection ombudsman had been fired](#), which was for bringing legal action – as he was obligated by EU law to do – against the Hungarian government for collecting personally identifiable political opinions of its citizens through “national consultations.”

The non-independence of the national data protection authority that replaced him has become clear because, in 10 years, the new data protection authority blew the whistle on nothing as the powers of the surveillance state grew. He said nothing about the “[national consultations](#)” that the government has continued to run to this day, nor about the unlimited surveillance capacities of the TEK (Anti-Terrorism Police) even after the [European Court of Human Rights found](#) that the TEK's powers

violated the Convention rights of those spied on. Nor did he say anything about the creation of a [far-reaching facial recognition system](#), and he has still said nothing about the [use of Pegasus spyware against journalists](#). Removing a data protection official who was illegally appointed in the first place would be acting in the spirit of European law, not violating it. A new data protection ombudsman could begin the process of dismantling the wholesale collection of private and sensitive information by the government, following both EU law and ECtHR decisions on data privacy and using EU and ECHR data protection law as a guide.

Restoring Freedom of the Civil Sector

In a free and democratic society, civil society groups should be able to operate without being monitored, criminalized or shut down by the state. Decision [C-78/18](#) of the ECJ found unlawful Hungary's statute requiring civil society associations to disclose all foreign sources of funds and to publicly label themselves as foreign agents when their income from foreign sources exceeded a rather small amount. Surely the new law allegedly "complying" with this decision that now requires the Fidesz-controlled [State Audit Office to audit the books](#) and publish the finances of all civil sector organizations is not in keeping with the spirit of that decision. Disapplying this new law would free the civil sector to act independently without state interference. In addition, a new Parliament could also ensure that it complied with the ECJ decision in [Case C-821/19](#), which requires decriminalizing the activities of civil society groups that assist refugees. Religious organizations deprived of their status as registered churches could have their rights restored if a new Hungarian Parliament complied with the 2014 ECtHR decision in [Magyar Keresztény Mennonita Egyház v. Hungary](#).

Fighting corruption

Since the passage of the [Conditionality Regulation](#), which permits the European Commission (with approval of the Council) to cut funds to EU Member States whose rule of law violations put EU funds at risk, anti-corruption measures are required under Union law as a condition of receiving EU funds. This would require sweeping reforms to the judiciary, public prosecutor's office, procurement and audit offices and more. Hungary has so far not received any of its allocated money under the Recovery Fund because [the Commission has not been satisfied](#) that Hungary has guaranteed the conditions for proper spending of EU money due to systemic problems that have produced [multiple negative assessments](#) from EU stakeholders. The EU has pointed repeatedly to the lack of high-level prosecutions of those affiliated with the governing party despite repeated OLAF findings of problems with corruption. To comply with EU law and receive the funds, a new Parliament would have to – among other things – reform the office of the public prosecutor. A new Parliament could also [vote to join the European Public Prosecutor's Office](#) and urge all those with evidence of corruption to take their evidence there – including evidence about the corruption of the current public prosecutor's office itself.

All of these measures would harmonize Hungarian law with European law, by acknowledging the supremacy of EU law, Hungary's ECHR treaty obligations and those provisions of domestic law that reinforce both. In cases where national law violates European law, the Parliament would be justified in setting aside the conflicting national law, even when those laws are two-thirds laws. The constitutional problem of changing two-thirds laws with a simple-majority Parliament can be overcome if the jurisprudence of the ECJ requiring Member States to remove barriers to the enforcement of EU law can be used to dismantle the legal structures within Hungary that prevent the realization of EU law.

The Constitutional Conundrum

What, you might ask, about the Fundamental Law? So far, we have discussed statutes that violate treaty obligations, but the Hungarian constitution stands above both and the constitution hedges its bets on European law. A constitutional amendment in 2018 signaled that the Hungarian government was not ready to acknowledge the automatic supremacy of EU law – with the changed text in italics:

Article E(2): In its role as a Member State of the European Union and by virtue of international treaty, Hungary may – to the extent necessary for exercising its rights and fulfilling its obligations stemming from the Founding Treaties – exercise certain competences deriving from the Fundamental Law, together with the other Member States, through the institutions of the European Union. *The exercise of powers under this Paragraph must be consistent with the fundamental rights and freedoms set out in the Fundamental Law, and it must not be allowed to restrict Hungary's inalienable right of disposition relating to its territorial integrity, population, political system and form of governance.*

Article R(4) was added to the Fundamental Law at the same time to bolster the point:

Each and every body of the State shall be obliged to protect the constitutional identity and the Christian culture of Hungary.

The italicized parts of Article E(2) drew a red line that the EU may not cross with regard to Hungary, putting Hungary's decisions about its territorial integrity, population, political system and form of governance beyond the EU's reach. Even before the constitutional amendment passed, the Constitutional Court defended Orbán's defiance of the EU in its decision [22/2016 \(XII. 5.\) AB](#), by claiming that it had the power to review EU acts to assess whether they were in compliance with the rights provisions of the Hungarian constitution, whether they stayed within the boundaries of conferred powers (*ultra vires* review) and whether they respected Hungarian sovereignty. After the constitutional amendment passed, providing the additional ground of national identity review, the Court issued another decision in 2019, [2/2019. \(III. 5.\) AB](#), in which it dutifully warned the EU away from interfering with its homogeneous population. From this, it would appear that the Constitutional Court will be the biggest obstacle in trying to reform Hungarian law through

European law, asserting that it is the final interpreter not only of the Fundamental Law but also of all international agreements subordinate to it.

But there are two ways to get around an obstructionist Court. First, the Constitutional Court itself seems to be wondering about the wisdom of a confrontation with the EU so it might just change once the Parliament does. Second, we can use European law to disable the Court.

The Constitutional Court in its decision of 11 December 2021, X/477/2021, available [here](#), just backed down from a direct assault on the primacy of EU law. Justice Minister Judit Varga had asked the Court whether she was required to follow the ECJ's decision in [Case C-808/18](#) requiring Hungary to allow asylum-seekers to wait inside Hungary for the processing of their cases. She argued that the constitutional identity provisions pertaining to territory and population meant she could disregard the ECJ decision. But the Court sidestepped the question, claiming that a concrete question about a specific case could not be asked through an abstract review petition and therefore ruling that it did not have jurisdiction.

The Court wavered even more in its willingness to follow the government into a direct standoff with the European Union when it relied heavily on a set of its own prior decisions made when a still-independent Court was resisting being packed by Orbán. The Court even cited one of its own cases from before the new constitution went into effect, defying the [Fidesz Fourth Amendment](#) to the Fundamental Law which barred the Court from relying on any cases decided under the old Constitution.

In this crucial case for the government, then, the Court was defiantly citing cases in which the Court stood up to Orbán. For those who knew how to read between the lines in that citation pattern, the cases that the Court chose to rely on seemed to be declaring independence.

In addition, the Court is now supposed to consider Hungary's historic constitution, but in this case the Court relied on a poignant piece of that history: St. Stephen's admonition to his son Imre. St. Stephen is, of course, Hungary's first Christian king, crowned by the Pope, who, according to the constitutional preamble, "set the Hungarian State on solid foundations, and made our country a part of Christian Europe." The Constitutional Court opinion doesn't quote the admonition but every Hungarian knows it by heart:

For a country of one single language and one set of customs is weak and vulnerable. Therefore I enjoin on you, my son, to protect newcomers benevolently and to hold them in high esteem so that they should stay with you rather than dwell elsewhere.

If Judit Varga wanted an answer to her question of whether asylum seekers should be able to remain in Hungary, there it was. So, the Court may have already decided that honoring EU law is wise at this point.

Suppose, however, that the Constitutional Court hardens its approach when a new Parliament comes to power and it doubles down on enforcing the Orbán constitution

Orbán's way, citing Article E(2) of the Fundamental Law. There are two approaches open to the new Parliament.

First, the Parliament, as a body entitled to ask for abstract review from the Constitutional Court, could send EU-law-violating Hungarian statutes to the Constitutional Court for review, with requests that the Constitutional Court send references to the ECJ for confirmation of whether the spotlighted laws are in violation of EU law. The Parliament could even draft the questions it would like for the ECJ to answer. Would the Constitutional Court dare refuse the direct request to make a reference? And then, would it dare to refuse the answer that was returned from Luxembourg?

If the Constitutional Court dug in further and decided to block either references or the orderly harmonization of Hungarian law with its international legal obligations, the Parliament could stand behind a test case that could be taken to the ECtHR for a decision, citing [the Xero Flor](#) judgment that found Poland's Constitutional Tribunal was not a "tribunal established by law." In that case, the ECtHR set out standards that any court – including a constitutional court – must meet in order to remain independent, citing in particular the absence of "undue interference by the executive or the legislature with the judiciary" (para. 276) as the crucial point. The petitioner to the ECtHR would argue that when [the Fidesz government changed the rule](#) in 2010, with votes of only its own party, to allow itself to appoint all judges to the Constitutional Court without any support from the political opposition, and then simultaneously expanded the number of judges on the bench, the Fidesz government was politicizing the Court by packing it. The Hungarian government has since appointed party loyalists to the bench and the Court has acted largely as the government has wished, with few exceptions. But if the Polish Constitutional Tribunal is no longer properly constituted because it was captured and packed, neither is the Hungarian Constitutional Court by the same standard. If the European Court of Human Rights would say so, just as it did in Poland, then a new Parliament would be justified in simply ignoring decisions of this Court. Or in dismantling it.

As [András Jakab has said elsewhere in this symposium](#), however, many of those who have done Orbán's dirty work all these years really don't believe in the cause. They are opportunists who will switch sides if the Parliament changes hands. And it's best to give them time and space to do it. The deep state may not be as deep as it looks.

In fact, I think that this new Constitutional Court decision on 11 December already shows that he's right. At least some judges in the Court see the end of Orbán's reign coming, and they don't want to be on the wrong side of either history or politics. In the end, I believe that the Court will bend rather than break, especially when given good legal reasons to do so. If a new Hungarian Parliament sets about harmonizing Hungarian law with its European legal obligations, the Constitutional Court will surely see that there are European legal avenues through which it can be simply bypassed and fall into line.

Backsliding democracies around the world all face the problem of how to restore the rule of law. Precisely because it is already embedded in European law, with deep

Hungarian roots that have long honored European traditions and its international law obligations, Hungary has the option of simply embracing European law to provide a legal path back to the rule of law.

